IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 17, 2009 Session

STEVE BIGGERS v. LAURENCE K. HOUCHIN

Appeal from the Chancery Court for Davidson County
No. 06-3019-II Carol McCoy, Chancellor

No. M2008-01356-COA-R3-CV - Filed July 21, 2009

This is the second suit and third appeal filed by Plaintiff arising out of his termination as an independent contractor truck driver for Transport Services, Inc. (TSI). The sole defendant in the first action filed in the circuit court was TSI. The sole defendant in this action filed in the chancery court is Laurence Houchin who, Plaintiff contends, caused TSI to wrongfully terminate him. The circuit court action was summarily dismissed. While that decision was on appeal, Plaintiff initiated this action. The chancellor summarily dismissed this action, finding the claims were barred by the doctrine of collateral estoppel. Plaintiff appealed the dismissal of his Complaint. Three weeks after the chancery court action was summarily dismissed, the defendant filed a Tenn. R. Civ. P. 11 Motion for Sanctions, in which he sought to recover "attorney's fees and expenses incurred by Mr. Houchin to defend this action, the attorney's fees and expenses to present this motion, and such other and further sanctions as the court deems appropriate and necessary to deter repetition of such conduct . . . ." Following a hearing, the chancellor ordered Plaintiff to "dismiss the Notice of Appeal, appealing the dismissal of the frivolous complaint filed in this matter" as a "nonmonetary sanction" and to pay $1,151.75 as a "monetary sanction." Eleven months later, Plaintiff filed a Tenn. R. Civ. P. 60 motion to set aside the court's order requiring him to dismiss his appeal to pay monetary sanctions. The chancellor denied Plaintiff's motion to set aside and, thereafter, awarded an additional $7,871.89 in sanctions against Plaintiff. This appeal followed. Plaintiff contends the chancellor erred in denying his Motion to Set Aside and in awarding Rule 11 sanctions against him. We have determined the chancellor erred in directing Plaintiff to dismiss his notice of appeal and, thus, erred in denying Plaintiff's Tenn. R. Civ. P. 60.02 motion to set aside that order. We have also determined that Mr. Houchin is not entitled to Rule 11 sanctions; therefore, the chancellor erred in denying Plaintiff's motion to set aside the award of sanctions.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Steve Biggers, Nashville, Tennessee, Pro Se.

Mark North, Madison, Tennessee, for the appellee, Laurence Houchin.

OPINION

This action against defendant Laurence Houchin arises out of the termination of Steve Biggers' (Plaintiff) independent contractor agreement with Transport Services, Inc. (TSI). Plaintiff worked as a truck driver/courier for TSI pursuant to an independent contractor agreement from March 2003 to November 2004, when TSI unilaterally terminated its contract with Plaintiff.

In a prior civil action filed by Plaintiff against TSI in the Davidson County Circuit Court, Plaintiff alleged that TSI breached the contract by terminating the contract without just cause. The action against TSI was summarily dismissed by the circuit court upon TSI's motion. Immediately after the dismissal of the circuit court action, Plaintiff filed this action in the chancery court against TSI independent contractor Laurence K. Houchin, alleging that Mr. Houchin tortiously interfered with Plaintiff's contract with TSI resulting in the wrongful termination of Plaintiff's contract.

The history of Plaintiff's relationship with TSI, the procedural history of the former circuit court action and the appeal of the circuit court's decision to this court in 2006 are germane to the issues raised in this appeal and are detailed in our opinion in *Biggers v. Transport Servs., Inc.*, No. M2006-01549-COA-R3-CV, 2007 WL 1452721, at *1-3 (Tenn. Ct. App. May 16, 2007) (no Tenn. R. App. P. 11 application filed).[1] A brief summary of that relationship, the circuit court proceedings and the appeal that followed are stated in the following paragraphs.

TSI is a business that provides courier services in fifteen states, including Tennessee. On March 27, 2003, TSI entered into an "Independent Contractor Agreement" with Plaintiff to provide courier services in the Middle Tennessee area. The contract was in force at all times material to this action.

Plaintiff's duties with TSI primarily consisted of transporting photographic film for processing. In the fall of 2004, TSI began to transport chemicals used to develop photographs; therefore, as regulations required, all of TSI's drivers were required to be trained to properly handle these chemicals. Plaintiff was properly trained; however, on November 21, 2004, Plaintiff used an untrained substitute driver to run his route. At the time, TSI's "lead driver" was Mr. Houchin. When Mr. Houchin learned about the incident, he submitted an incident report stating that Plaintiff's substitute driver was not properly trained. This report was provided to management and Plaintiff. In addition to filing the incident report, Mr. Houchin informed Plaintiff that another courier would drive Plaintiff's route the following day, November 22, 2004. In spite of Mr. Houchin's directive,

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[1] The 2007 opinion was designated by this court as a Memorandum Opinion pursuant to Tenn. Ct. App. R. 10, which provides:

> The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Plaintiff ran his regular route on November 22, 2004. Upon learning of this incident, Mr. Houchin submitted a report regarding the November 22nd incident, and Mr. Houchin additionally reported that Plaintiff had commented that he intended to "get in the face" of the person responsible for leaving a note criticizing him. Mr. Houchin also reported that Plaintiff had been "confrontational" on other occasions and that he had been "unwilling to work with and assist other contractors." Upon receipt of the second incident report, Plaintiff demanded a meeting with the owner of TSI, Charles Van Cleave.

Mr. Van Cleave, who lived in another state, traveled to Nashville to meet with Plaintiff. During their meeting, Mr. Van Cleave asked Plaintiff to explain the two incident reports. Plaintiff refused to address the incident reports, insisting that he was an independent contractor and that "reprimands do not affect me one way or the other." At the conclusion of the meeting, Mr. Van Cleave informed Plaintiff that his contract was terminated effective immediately.

Soon thereafter, Plaintiff filed a breach of contract action against TSI. *Biggers v. Transport Services., Inc.*, No. 04C-3693, Circuit Court for Davidson County. Following discovery, TSI filed a motion for summary judgment, asserting that the undisputed facts demonstrated that TSI had just cause to terminate the contract. The circuit court judge conducted a hearing on the motion and on June 19, 2006, entered an order summarily dismissing the Plaintiff's Complaint on the ground the undisputed facts showed that Plaintiff had breached his duty of loyalty to TSI and, therefore, TSI had just cause to terminate Plaintiff. That judgment gave rise to the first of three appeals to be filed by Plaintiff.

In the 2006 appeal from circuit court, Plaintiff insisted that the judge erred in granting TSI's motion for summary judgment because the record contained material factual disputes. *See Biggers v. Transport Servs., Inc.*, 2007 WL 1452721, at * 1. The dispositive issue in the circuit court appeal was whether the undisputed evidence demonstrated that TSI had good cause to terminate Plaintiff's contract. In our opinion that followed, this court affirmed the circuit court, finding the only conclusion that a reasonable person could draw from the facts is that TSI had just cause to terminate Plaintiff. *Id*. at *3. This conclusion was based primarily on Plaintiff's own testimony. *Id*.

While the appeal from circuit court was pending, Plaintiff filed this action against Mr. Houchin in chancery court, alleging that he tortiously interfered with Plaintiff's contract with TSI. The underlying facts are essentially the same as outlined above. The only material differences are the identity of the defendant – TSI was the sole defendant in the circuit court action and Mr. Houchin is the sole defendant in this action – and the nature of the claim – the first for breach of contract, the second for tortious interference with the foregoing contract.

On January 10, 2007, Mr. Houchin filed a Motion to Dismiss the chancery court action on the ground that the claims were barred by the doctrine of collateral estoppel. The chancellor granted the motion in an order entered on March 2, 2007, thereby dismissing the chancery court action. Three weeks later, on March 23, 2007, Mr. Houchin filed a motion for sanctions pursuant to Tenn.

R. Civ. P. 11. Four days later, on March 27, Plaintiff appealed the chancellor's March 2nd order dismissing his Complaint.

Following a hearing on the motion for sanctions, the chancellor granted Mr. Houchin's motion for Rule 11 relief, ordered as a nonmonetary sanction that Plaintiff dismiss the appeal and ordered Plaintiff to pay monetary sanctions in the amount of $1,151.75. The chancellor's order, which was entered on April 30, 2007, reads as follows:

ORDER

This matter came on to be heard before the Honorable Chancellor Carol McCoy on April 20, 2007 upon Defendant's Motion for Sanctions. Based upon the entire record and on the argument of counsel, it appears to the Court as follows:

1. That the Complaint was frivolous when it was filed and that it was dismissed after a timely Motion to Dismiss was filed by the Defendant.

2. On February 28, 2007, after the action was dismissed, the attorney for the Defendant sent a letter to plaintiff's attorney setting out that it will be Mr. Houchin's position that the lawsuit was frivolous, that it had no basis in law or fact, and was founded solely on Mr. Bigger's malice and ill will toward Mr. Houchin. The letter further indicated that a Motion for Sanctions would be filed after 21 days. A copy of the proposed Motion for Sanctions was delivered with the letter.

3. Attorney for plaintiff did not respond to the letter or contact the attorney for the Defendant, but filed a Notice of Appeal, appealing the dismissal of the Complaint.

4. The Court recognizes and agrees with Defendant that the Complaint was frivolous but notice that sanctions would be sought did not occur until after the Complaint was dismissed.

5. Plaintiff's counsel should have recognized that continuing the litigation would subject plaintiff to sanctions, nevertheless Notice of Appeal was filed because the plaintiff insisted that an appeal be taken.

6. According to Rule 11.03 of the Tennessee Rules of Civil Procedure, sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated . . . the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." T.R.C.P. Rule 11.03(2) Moreover, "the court may award to the party prevailing on the motion the reasonable

expenses and attorneys' fees incurred in presenting or opposing the motion." T.R.C.P. Rule 11.03(1)(a)

7. An appropriate nonmonetary directive is an order to dismiss the Notice of Appeal, appealing the dismissal of the frivolous Complaint filed in this matter.

8. According to Affidavit filed and statement of counsel in open court, defendant, the moving party on the Motion for Sanctions, incurred $1,151.75 in attorneys' fees and expenses.

9. It is appropriate that a sanction be entered against plaintiff Steve Biggers and that he be ordered to pay to Defendant and Defendant's counsel, a sum of $1,151.75.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that monetary sanctions be entered against plaintiff Steve Biggers, individually, and that he hereby is ordered to pay $1,151.75 as a monetary sanction and as reasonable attorneys' fees and expenses to Laurence K. Houchin and Mark North, his attorney.

IT IS FURTHER ORDERED, ADJUDGED and DECREED as a nonmonetary sanction that plaintiff be and hereby is ordered to dismiss the appeal in this matter and that plaintiff's attorney, Lorraine Wade, is hereby ordered to file the necessary document or pleading to effect the nonmonetary sanction and dismiss the appeal.

* * * *

IT IS SO ORDERED.

For the next ten months it appeared that the protracted litigation had come to an end, as there were no court filings during that time period. The pause in the litigation, however, came to an end on April 22, 2008, when Plaintiff, acting *pro se*, filed a Tenn. R. Civ. P. 60 motion to set aside the chancellor's April 30, 2007 order that directed Plaintiff to dismiss his appeal and ordered him to pay sanctions.[2] On May 22, 2008, the chancellor denied Plaintiff's motion for Rule 60 relief. Plaintiff timely filed a notice of appeal from that order. It was this decision that gave rise to the present appeal; however, the notice of appeal did not end the proceedings in the chancery court, as Mr. Houchin then filed another motion for sanctions on June 6, 2008. Following a hearing on Mr. Houchin's second motion for sanctions, the chancellor awarded $2,871.89, as reimbursement for the attorney's fees Mr. Houchin had incurred, and the chancellor awarded an additional $5,000 as sanctions "to deter further frivolous actions" by Plaintiff, for a total of $7,871.89 in sanctions.

[2] Plaintiff's appeal of the order dismissing his Complaint was ultimately dismissed by this court on May 21, 2007, for failing to file a bond for costs.

In this appeal, Plaintiff contends the chancellor erred in denying his Rule 60 motion to set aside the order requiring Plaintiff to dismiss his appeal of the chancellor's April 30, 2007 ruling, and in denying his motion to set aside the Rule 11 sanctions awarded against him. In addition to the issues raised by Plaintiff, Mr. Houchin contends this appeal is frivolous and, therefore, further sanctions against Plaintiff are warranted.

ANALYSIS

We begin our analysis with an appreciation of one of the most fundamental rights a litigant has – the "appeal as of right," which is the absolute right of a litigant to appeal a final judgment of the trial court. This unbridled right is recognized in the Tennessee Rules of Appellate Procedure. *See* Tenn. R. App. P. 3.

An "appeal as of right" by a civil litigant "is an appeal that *does not require permission of the trial or appellate court* as a prerequisite to taking an appeal."[3] Tenn. R. App. P. 3(c) (emphasis added). The relevant portion of the Rule 3 reads as follows:

> **Rule 3. Appeal as of Right: Availability; Method of Initiation**
>
> **(a) Availability of Appeal as of Right in Civil Actions.** – In civil actions *every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right*. Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

Tenn. R. App. P. 3(a) (emphasis added). An appeal as of right to the Court of Appeals shall be taken by timely filing

> a notice of appeal with the clerk of the trial court as provided in Rule 4 and by service of the notice of appeal as provided in Rule 5. An appeal as of right may be taken without moving in arrest of judgment, praying for an appeal, entry of an order permitting an appeal or compliance with any other similar procedure. . . . Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal. The trial court clerk shall send the trial judge a copy of all notices of appeal.

[3] The Advisory Commission Comments to Tenn. R. App. P. 3 make it clear that the rules recognize two types of appeals: "appeals as of right" and "appeals by permission." The former does not require permission of the court; the latter does.

Tenn. R. App. P. 3(d). As subsection (d) expressly provides, an appeal as of right does not require the permission of the trial court as a prerequisite to taking an appeal. Moreover, the Advisory Commission Comments instruct that the final sentence of Rule 3(e), which states that "[t]he trial court clerk shall send the trial judge a copy of all notices of appeal," merely "ensures that trial judges will know what decisions have been appealed." Neither the Tennessee Rules of Civil Procedure, the Tennessee Rules of Appellate Practice, nor any other authority of which we are aware, empower the trial court to direct that a timely filed notice of an "appeal as of right" be involuntarily dismissed.

On appeal, Mr. Houchin does not dispute the fact that the order denying the Tenn. R. Civ. P. 60.02 motion to set aside constituted a final judgment from which Plaintiff was entitled to pursue a Tenn. R. App. P. 3(a) appeal as of right. The appeal taken by Plaintiff was an appeal as of right from an order of the chancery court. Therefore, the chancellor committed clear error in ordering Plaintiff to dismiss his appeal and erred by denying Plaintiff's Tenn. R. Civ. P. 60.02 motion to set aside the order directing Plaintiff to dismiss his appeal and the imposition of sanctions for failing to do so.

RULE 11 SANCTIONS

For his second issue, Plaintiff contends the chancellor erred in assessing monetary sanctions pursuant to Tenn. R. Civ. P. 11. We have determined that Mr. Houchin is not entitled to Rule 11 sanctions for two reasons. One, the Complaint was dismissed in the trial court before the twenty-one-day grace period afforded by Rule 11.03(1) had expired. Two, Mr. Houchin failed to mitigate his damages and the damages he sought to recover as sanctions were self-inflicted.

Tenn. R. Civ. P. Rule 11.02 states that a party, by presenting a pleading, written motion, or other paper, is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
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> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
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> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
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> (4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Tenn. R. Civ. P. Rule 11.02. The Rule further provides that sanctions may be appropriate "if, after notice and a reasonable opportunity to respond, the court determines that subdivision 11.02 has been violated, . . ." Tenn. R. Civ. P. Rule 11.03.

An aggrieved party may initiate a request for sanctions by filing *"a motion for sanctions . . . in which the movant describes the specific conduct alleged to violate subdivision 11.02*." Tenn. R. Civ. P. Rule 11.03(1)(a) (emphasis added). It is critical to note, however, that the Rule 11 motion for sanctions, which is to be served on the adverse party, "shall *not* be filed with . . . the court *unless*, *within 21 days after service of the motion* . . . , the challenged paper, claim, . . . allegation, or denial is not withdrawn or appropriately corrected. . . ." *Id*. This latter provision is in recognition of an important component of Rule 11, the twenty-one-day safe harbor provision, which affords otherwise sanctionable papers or claims to be withdrawn, thereby affording the offending party the opportunity to avoid sanctions. *See Mitrano v. Houser*, 240 S.W.3d 854, 862 (Tenn. Ct. App. 2007).

If warranted, the court may award the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Tenn. R. Civ. P. 11.03(1)(a). In this regard, the Rule instructs that "[a] sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Tenn. R. Civ. P. 11.03(2). Subject to certain limitations, the sanction may include "directives of a nonmonetary nature, . . . or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." *Id*. "When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed." Tenn. R. Civ. P. Rule 11.03(3).

The Twenty-One-Day Safe Harbor Provision

An important component of Rule 11 is the twenty-one-day safe harbor provision. *See* Tenn. R. Civ. P. 11.03(1)(a); *Mitrano*, 240 S.W.3d at 862. Mr. Houchin failed to appreciate this important component of Rule 11. Instead of affording Plaintiff the opportunity to fold his tent during the twenty-one-day window without the imposition of sanctions, as Tenn. R. Civ. P. Rule 11.03(1)(a) expressly provides, Mr. Houchin made demands of Plaintiff that are not available under the Rule. Specifically, Mr. Houchin not only demanded that Plaintiff dismiss the "frivolous" Complaint, he also demanded the prompt payment of $3,598.17 for fees incurred prior to serving the motion on Plaintiff's counsel. These demands were stated in a letter from Mr. Houchin's counsel to Plaintiff's counsel, dated February 28, 2007, which reads:

> Pursuant to Rule 11.03 of the Rules of Civil Procedure, this letter and the enclosed Motion serves as Notice that Defendant Houchin will be seeking sanctions to recover his attorney's fees and expenses he incurred defending the action brought against him by Steve Biggers. It will be Mr. Houchin's position that the lawsuit filed against him was frivolous, had no basis in law or fact, and was founded solely on Mr. Biggers' malice and ill will toward Mr. Houchin.

> As a result of this action, as of today, Mr. Houchin has incurred legal fees and expenses totaling $3,598.17, not including those fees and expenses incurred in the preparation of this letter and a Motion for Sanctions.
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> The Motion has not yet been filed, so that this injustice may be remedied without the need to file the Motion for Sanctions. This letter and the Motion for Sanctions also serve as Mr. Houchin's attempt to mitigate his damages resulting from Mr. Biggers' malicious prosecution.
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> The Motion will be filed the morning of March 23, 2007, *if the damages are not remedied*.

(Emphasis added).

Tenn. R. Civ. P. 11 does not provide for the payment for fees and expenses incurred prior to notification to avoid the imposition of Rule 11 sanctions. The Rule merely provides that the offending paper, claim, or allegation is to be withdrawn or corrected prior to the expiration of the twenty-one-day grace period. As our Supreme Court explained in *Andrews v. Bible*, the goal of Rule 11 is

> deterring abuse in the litigation process by providing guidance concerning the procedures and standards utilized in the imposition of Rule 11 sanctions. . . . The public has an interest in, and the judiciary a responsibility for, the efficient, economic, and expeditious administration of justice. Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless inconvenience, expense, and delay. Rule 11 is a powerful tool for judges in their roles as judicial overseers and attorneys in their battle against fellow practitioners who do not comply with their obligations under the Rule.
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> To be sure, this Court views Rule 11 as a potent weapon that can and should be used to curb litigation abuses that from time to time plague the dockets of our trial courts. Invoked properly, Rule 11 can confer great benefits on all concerned.

Andrews v. Bible, 812 S.W.2d 284, 292 (Tenn. 1991) (internal citation omitted). After praising the benefits of Rule 11, the Court recognized, however, that the abuse of Rule 11 "may chill an attorney's enthusiasm and stifle the creativity of litigants in pursuing novel factual and legal theories," and, as a result, the legal system as a whole would suffer. *Id*. Chief Justice Drowota, writing for the Court, then quoted from an opinion authored by Justice Kennedy in a Federal Rule 11 case:

> Just as patience is requisite in the temperament of the individual judge, so it must be an attribute of the judicial system as a whole. Our annoyance at spurious and frivolous claims, and our real concern with burdened dockets, must not drive us to

> adopt interpretations of the rule that makes honest claimants fear to petition the courts.

Id. at 293. For this reason, Chief Justice Drowota continued:

> trial courts, while urged not to hesitate to impose sanctions once a violation of Rule 11 is found to exist, should use utmost care in doing so. The reputations and careers of attorneys may be seriously and permanently hampered when Rule 11 is implemented in a careless fashion.[4] Our opinion, however, should not be construed in a light inconsistent with this court's view that Rule 11 stands poised to punish those who would manipulate the judicial system for ends inimicable to those for which it was created.

Id. (internal citations omitted).

When Mr. Houchin sent the letter to Plaintiff on February 28, 2007, with the accompanying motion, Mr. Houchin was not entitled to demand *remedies*, meaning the payment of $1,151.75 by March 23, 2007. Nevertheless, Mr. Houchin was entitled to pursue Rule 11 sanctions against Plaintiff *if* the appropriate remedial action – voluntary dismissal or amendment of the offending pleading – was not addressed within the twenty-one-day grace period. The record reveals that Plaintiff did neither; therefore, Plaintiff would have been exposed to the prospect of Rule 11 sanctions thereafter. We note, however, that the case was summarily dismissed, in its entirety, before Plaintiff received the letter and copy of the motion. The affidavit of Plaintiff's counsel reveals that she received the February 28, 2007 letter on March 3; the order dismissing the case was entered the day before, on March 2, 2007. Accordingly, the Complaint had already been dismissed; therefore, there was no offending pleading to be dismissed or amended.

Duty to Mitigate One's Damages

We now turn our attention to what transpired in the trial court after the Complaint was dismissed. We find this significant because an important component of Tenn. R. Civ. P. 11 is the duty to *mitigate* one's damages. The significance of mitigating one's damages was at issue in *Andrews*. Significantly, the Court noted that the defendant "had ample opportunity to conclude the matter much earlier in the litigation" and that the defendant, "as the party seeking sanctions, had a duty to mitigate."[5] *Id*. at 291 (citing *White v. General Motors*, 908 F.2d 675, 684 (10th Cir.1990);

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[4] It would appear that a violation of Rule 11 could stem from a variety of causes: inexperience, incompetence, neglect, wilfulness, or deliberate choice. In assessing the cause, the trial judge should consider not only the circumstances of the particular violation, but also the factors bearing on the reasonableness of the conduct, such as experience and past performance of the attorney, as well as the general standards of conduct of the bar of the court.

[5] The Supreme Court found it relevant that "neither counsel communicated with the other for nearly a year, and defense counsel did not file for summary judgment until after he learned that the matter was going to be subject to a (continued...)

Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 879 (5th Cir.1988)). Further, the Supreme Court stated that as a general principle, "it would be *inequitable* to permit a defendant to increase the amount of attorney's fees recoverable as a sanction by unnecessarily defending against frivolous claims which could have been dismissed quickly on motion." *Id*. at 291-92 (emphasis added) (citing *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir.1986)). As the Court explained:

> [A]n attorney may not remain idle after Rule 11 has been violated. A party seeking sanctions should give prompt notice to the court and to the offending party upon discovering a basis for doing so. Prompt notice of Rule 11 sanctions conserves judicial time, energy, as well as monetary resources, while at the same time deters future violations. One court has properly observed:
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> > Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is intended to eliminate. It also undermines *the mitigation principle* which should apply in the imposition of sanctions, *limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper.*

Id. at 292 (internal citation omitted) (emphasis added).

As we learned from *Andrews*, the court should consider the extent to which the damage is "self-inflicted" due to the failure of the moving party to mitigate its damages. *Id*. If a baseless claim could have been readily disposed of, "there is little justification for a claim of attorney's fees and expenses engendered in elaborate proceedings in opposition" to the baseless claim. *Id*. at 292 (quoting *Thomas v. Capital Sec. Services, Inc*., 836 F.2d 866, 889, n.19 (5th Cir.1988)). The purpose of Rule 11 "would be frustrated if it encouraged the offending party to play the very game at which it is aimed." *Id*. (quoting *Thomas*, 836 F.2d at 889, n. 19). Applying the foregoing principles, we have concluded that Mr. Houchin's damages were self-inflicted due to the fact he filed the motion for summary judgment *prior to serving the Rule 11 notification on Plaintiff* and the case was dismissed prior to the expiration of the twenty-one-day grace period.

We decline to speculate whether Mr. Houchin would have been entitled to recover his attorney's fees and expenses incurred on appeal. This is because Plaintiff's appeal never got off the ground as this court *sua sponte* dismissed the appeal due to Plaintiff's failure to post a cost bond. As for the attorney's fees and expenses incurred after Plaintiff filed his notice of appeal, we have determined Mr. Houchin is not entitled to recover those fees as they were incurred in an effort to deprive Plaintiff of his inalienable right of appeal, which he may or may not have prevailed upon, and Mr. Houchin would only have been entitled to recover Rule 11 sanctions had he prevailed on

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[5](...continued)
docket sounding and set for trial."

appeal. The other fees and expenses incurred in the trial court following the summary dismissal of the Complaint were in an effort to recover sanctions, which we have determined Mr. Houchin was not entitled to recover.

We have determined that Mr. Houchin is not entitled to recover any sanctions under Tenn. R. Civ. P. 11. Therefore, it was error to deny Plaintiff's motion to set aside the award of sanctions.

IN CONCLUSION

For the foregoing reasons, we reverse the chancellor's decision to deny Plaintiff's Tenn. R. Civ. P. 60.02 motion to set aside the order compelling Plaintiff to dismiss his appeal and to set aside the sanctions awarded against Plaintiff pursuant to Tenn. R. Civ. P. 11. Costs of this appeal shall be taxed against Laurence K. Houchin. As for Mr. Houchin's issue, that Plaintiff's appeal is frivolous, our decision confirms that it was not frivolous; thus, Mr. Houchin is not entitled to recover expenses or attorney's fees incurred on appeal.

The judgment of the trial court is reversed and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Laurence K. Houchin for which execution may issue.

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FRANK G. CLEMENT, JR., JUDGE